

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

MARTEK BIOSCIENCES CORPORATION, )

Plaintiff, )

v. )

C.A. No. 03-896-GMS

NUTRINOVA INC., NUTRINOVA )  
NUTRITION SPECIALTIES & FOOD )  
INGREDIENTS GMBH, CELANESE )  
VENTURES GMBH, and CELANESE AG, )

Defendants. )

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**REPLY BRIEF IN SUPPORT OF PLAINTIFF'S  
MOTION TO STRIKE PARAGRAPH 26 OF THE  
AFFIRMATIVE DEFENSES AND DISMISS  
PARAGRAPH 48 OF COUNT I AND COUNT III OF  
THE COUNTERCLAIMS BY NUTRINOVA INC. AND  
NUTRINOVA NUTRITION SPECIALTIES & FOOD INGREDIENTS GMBH**

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## **INTRODUCTION**

Plaintiff Martek Biosciences Corporation ("Martek") respectfully submits this reply brief in further support of its Motion to strike Paragraph 26 of the Affirmative Defenses, dismiss Paragraph 48 of Count I, and dismiss Count III of the Counterclaims of Defendants Nutrinova Inc. and Nutrinova Nutrition Specialties and Food Ingredients GmbH (collectively, "Nutrinova").

## **COUNTERSTATEMENT OF FACTS**

Nutrinova's answering brief paints a misleading picture of the events leading up to this lawsuit, which is corrected below.

Martek approached Nutrinova on May 27, 2003 when it became concerned about Nutrinova's potential infringing activity in connection with its commercialization of DHActive™. (Opp. Br. Ex. 2). At Nutrinova's request, Martek forwarded a discrete list of eighteen (18) patents that Martek believed at the time might be relevant to further discussions between the parties. (Opp. Br. Ex. 4). After several months, these discussions stalled. On September 23, 2003, Martek filed this suit alleging infringement of U.S Patent Nos. 6,607,900 ("the '900 patent") and 6,451,567 ("the '567 patent"), which patents had been the primary focus of the parties' communications. The '567 patent was included in the list of 18 patents provided to Nutrinova. The '900 patent, which issued subsequent to that list, was forwarded shortly thereafter.

## **ARGUMENT**

### **I. NUTRINOVA'S INEQUITABLE CONDUCT PLEADING IS INSUFFICIENT**

Nutrinova does not dispute that allegations of inequitable conduct, such as those pled in Paragraph 26 of the Affirmative Defenses and in Paragraph 48 of Count I of the

Counterclaims, are subject to stricter pleading requirements than the otherwise broad notice-pleading standards under the federal rules. Pursuant to Fed. R. Civ. P. 9(b), Nutrinova must “plead with particularity those facts which support the claims the patent holder acted fraudulently” before the Patent and Trademark Office (“PTO”). *Symbol Tech., Inc. v. Hand Held Products, Inc.*, No. Civ.A. 03-102-SLR, 2003 WL 22750145, at \* 4 (D. Del. Nov. 14, 2003) (Ex. A hereto) (emphasis added). Nutrinova does not, and cannot, demonstrate that it has met this requirement. The inequitable conduct pleadings neither “specify the time, place, and content of any alleged misrepresentations made to the PTO” nor “give . . . notice of the precise misconduct alleged.” *EMC Corp. v. Storage Tech. Corp.*, 921 F. Supp. 1261, 1263 (D. Del. 1996).

It is notable that Nutrinova completely ignores the authorities cited by Martek. In contrast, Nutrinova’s reliance solely on *Hoffman-La Roche v. Promega Corp.*, 325 F.3d 1354 (Fed. Cir. 2003) is misplaced inasmuch as that case says nothing about compliance with the particularity requirements of Rule 9(b). (Opp. Br. at 5). Furthermore, just as Nutrinova may not rely on future discovery to cure the insufficiency of its inequitable conduct pleading, *EMC*, 921 F. Supp. at 1263-64, it also may not rely on the contents of a “private” and “separate letter which Nutrinova contemporaneously sent to Martek”. (Opp. Br. at 1, 5-6; Opp. Br. Ex. 1).

Accordingly, this Court should strike Paragraph 26 of the Affirmative Defenses and dismiss Paragraph 48 of Count I of the Counterclaims. In the alternative, consistent with Nutrinova’s own proposal (Opp. Br. at 6), Martek respectfully requests that the Court order Nutrinova to amend its pleading to provide a more definite statement by including the contents of the letter attached to its answering brief as Exhibit 1.

## II. COUNT III DOES NOT MEET THE DECLARATORY JUDGMENT STANDARD

Nutrinova does not, and cannot, meet its burden in establishing an actual controversy with respect to Count III of the Counterclaims, which vaguely and open-endedly covers “any valid and enforceable claim of any issued United States patent owned by Martek” and “any valid and enforceable right<sup>1</sup> of Martek.” As discussed at length in Martek’s opening brief, a declaration addressing such broad and indefinite subject matter would be unprecedented and contrary to the Declaratory Judgment Act, 22 U.S.C. § 2201.

Nutrinova relies heavily on the Federal Circuit’s decisions in *Vanguard Research, Inc. v. PEAT, Inc.*, 304 F.3d 1249 (Fed. Cir. 2002), *Goodyear Tire & Rubber Co. v. Releasomers, Inc.*, 824 F.2d 953 (Fed. Cir. 1987), and *Dainippon Screen Mfg. Co. v. CFMT, Inc.*, 142 F.3d 1266 (Fed. Cir. 1998). (Opp. Br. at 7-8). But none of these cases involved a request for a declaration addressing each and every patent owned by, and each and every “right” held by a party, as Nutrinova requests here. To the contrary, in each case the declaratory judgment claims specifically identified the particular patent(s) at issue, and the court exercised declaratory judgment jurisdiction only with respect to the particular patent(s). *Vanguard*, 304 F.3d 1249 (exercising declaratory judgment jurisdiction with respect to just U.S. Patent No. 5,534,659); *Goodyear*, 824 F.2d 953 (exercising declaratory judgment jurisdiction with respect to just U.S. Patent Nos. 4,544,122 and 4,547,544); *Dainippon*, 142 F.3d at 1268 (exercising declaratory judgment jurisdiction with respect to just U.S. Patent No. 4,911,761). Accordingly, the law cited by Nutrinova is inapposite.

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<sup>1</sup> Nutrinova has still not explained or defined its vague and ambiguous use of the term “right.”

That Nutrinova could not possibly have had an objectively reasonable apprehension of suit as to every patent and every "right" owned by Martek is evident from the very documents relied on by Nutrinova.

In response to Martek's communication of May 27, 2003, in which Martek indicated in general terms its concerns about Nutrinova's commercialization activities (Opp. Br. Ex. 2), Nutrinova asked Martek on June 6, 2003 to "provide us with detailed information regarding the patents and respective claims you have in mind." (Opp. Br. Ex. 3). Martek responded to Nutrinova's request on June 18, 2003 by identifying "18 relevant Martek issued U.S. patents (list attached)." Even assuming, *arguendo*, that this exchange between Martek and Nutrinova justified any objectively reasonable apprehension on Nutrinova's part (which Martek disputes), at the very most Nutrinova objectively only could have been concerned about the 18 specific patents that were listed by Martek.

Nutrinova makes much of the fact that Martek has already sued it for infringement of the '900 and '567 patents. (Opp. Br. 6-9). But Nutrinova does not cite any authority for the proposition that the allegations of infringement concerning these two particular patents create a case of actual controversy with respect to the dramatically broader, and indeed completely open-ended scope of Count III. Contrary to Nutrinova's suggestions, subject matter jurisdiction is not unlimited in these circumstances. This Court must determine whether there is a case of actual controversy independently for each and every specific patent and "right" encompassed by Count III. *Grain Processing Corp. v. American Maize-Prods. Co.*, 840 F.2d 902, 906 (Fed. Cir. 1988) (holding that district court properly refused to entertain a declaratory judgment counterclaim for certain process claims of the patent-in-suit while permitting a declaratory judgment counterclaim for other product claims of the same patent); *Symbol*, 2003

WL 22750145, at \* 4 (Ex. A) (holding that the declaratory judgment plaintiff “has not established a reasonable apprehension of suit with respect to each of the named [patents]” when those named patents exceeded the patents referenced in correspondence between the parties, even though the controversy involved a single product line). Nutrinova does not even identify the particular patents and “rights” at issue in Count III, let alone establish a case of actual controversy separately for each such patent and “right.”

Nutrinova also mentions the fact that Martek has not disclaimed further lawsuits. (Opp. Br. at 9). But Martek is not required to covenant not to sue Nutrinova to avert creating a reasonable apprehension of suit. *O’Hagins, Inc. v. M5 Steel Mfg., Inc.*, 276 F. Supp. 2d 1020, 1026 (N.D. Cal. 2003) (citing *Fina Research, S.A. Baroid Ltd.*, 141 F.3d 1479, 1484 (Fed. Cir. 1998)). In the two cases Nutrinova cites, *Amana Refrigeration, Inc. v. Quadlux, Inc.*, 172 F.3d 852 (Fed. Cir. 1999) and *Super Sack Mfg. Corp. v. Chase Packaging Corp.*, 57 F.3d 1054 (Fed. Cir. 1995), a covenant not to sue was required in order to eliminate a reasonable apprehension already in existence. This is not the case here.

Nutrinova additionally argues that “Martek’s written assertions to Nutrinova constitute a basis for a declaratory judgment action.” (Opp. Br. at 3-4, 8). The letter that forms the basis of this argument identifies only a discrete list of 18 patents that Martek believed at the time might be “relevant” to its discussions with Nutrinova. Martek provided this list to Nutrinova at Nutrinova’s request in a good-faith attempt to facilitate discussions between the parties. Contrary to Nutrinova’s contention, a letter identifying specific patents does not establish a case of actual controversy with respect to any and all patents owned by, and any and all “rights” held by, its author. *Symbol*, 2003 WL 22750145, at \* 4 (Ex. A) (holding that patentee’s correspondence listing 10 patents did not create a case of actual controversy with



respect to the remaining patents in the portfolio directed to the same technology); *Samsung Elec. Co. v. Texas Instrus. Inc.*, 39 U.S.P.Q.2d 1673, 1677 (N.D. Tex. 1996) (holding that patentee's references to patent portfolio did not create a case of actual controversy with respect to entire portfolio); *AgriDyne Tech., Inc. v. W.R. Grace & Co.*, 863 F.Supp. 1522, 1529 (D. Utah 1994) (holding that patentee's references to specific patents and to patent portfolio did not create a case of actual controversy with respect to a related patent that was not specifically identified).

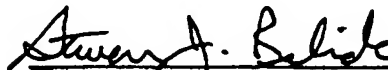
Finally, Nutrinova contends that Count III "is not so open-ended" (Opp. Br. at 6), and argues that justice and efficiency "[e]ncourage" this Court to exercise jurisdiction because "there is only one product and one process in issue." (Opp. Br. at 10). This argument wholly ignores the breadth of Nutrinova's pleading. Count III potentially encompasses Martek's entire intellectual property portfolio, including all of its patents, trademarks, trade secrets, copyrights, and any other undefined "rights" that Martek might have. Indeed, the scope is so broad and indefinite that Martek is unable to prepare a proper response. Martek will be greatly prejudiced if Nutrinova is permitted to proceed with such a declaratory judgment action. Therefore, even if the Court were to conclude that there is an actual controversy and that subject matter jurisdiction therefore exists (a conclusion that Martek believes is not warranted), Martek respectfully submits that the Court should exercise its discretion to decline that jurisdiction over Count III.

Accordingly, this Court should dismiss Count III of the Counterclaims.

**CONCLUSION**

For the reasons discussed above, Plaintiff respectfully requests that its Motion be granted.

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United States District Court,  
D. Delaware.

SYMBOL TECHNOLOGIES, INC., Plaintiff,  
v.  
HAND HELD PRODUCTS, INC. and HHP-NC,  
Inc., Defendants.

No. Civ.A. 03-102-SLR.

Nov. 14, 2003.

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#### MEMORANDUM ORDER

ROBINSON, J.

#### I. INTRODUCTION

\*1 Currently before the court are the following motions by the defendants Hand Held Products, Inc. and HHP-NC, Inc. (collectively "HHP"): 1) motion to dismiss U.S. Patent No. 5,591,956 of Count II for lack of subject matter jurisdiction; 2) motion to dismiss U.S. Patent No. 5,130,520 of Count I from the action because HHP holds a valid license; 3) motion to dismiss plaintiff's infringement and noninfringement claims from Counts I and II pursuant to Fed.R.Civ.P. 8 and 12(b)(6) for failure to state a claim; 4) motion to dismiss Count II of the complaint pursuant to Fed.R.Civ.P. 12(b)(1) and 12(b)(6) for lack of subject matter jurisdiction for failure to satisfy the jurisdictional requirements of 18 U.S.C. § 2201; 5) motion to dismiss plaintiff's invalidity and unenforceability claims from Count II pursuant to Fed.R.Civ.P. 8 and 12(b)(6) for failure to give notice of the bases for claims of invalidity and unenforceability; 6) motion to strike plaintiff's unenforceability allegations pursuant to Fed.R.Civ.P. 12(b)(6) for failure to plead fraud with particularity; and 7) motion for a more definite statement as to Counts I and II. (D.I.10) For the reasons and to the extent stated below, the court grants in part and denies in part HHP's motions.

#### II. BACKGROUND

Plaintiff Symbol Technologies, Inc. ("Symbol") and HHP are competitors in the hand-held optical scanner industry, each holding patents and manufacturing a variety of products. Symbol is the owner of U.S. Patent Nos. 5,029,183; 5,130,520; 5,157,687; 5,479,441; 5,521,366; 5,646,390; 5,702,059; 5,783,811; 5,818,028; 6,006,612; 6,019,286; and 6,105,871 (collectively, the "Symbol Patents"). HHP is the owner of U.S. Patent Nos. 5,286,960; 5,291,008; 5,391,182; 5,420,409; 5,463,214; 5,569,902; 5,591,956; 5,723,853; 5,723,868; 5,773,806; 5,773,810; 5,780,834; 5,784,102; 5,786,586; 5,793,967; 5,801,918; 5,825,006; 5,831,254; 5,837,985; 5,838,495; 5,900,613; 5,914,476; 5,929,418; 5,932,862; 5,942,741; 5,949,052; 5,949,054; 5,965,863; 6,015,088; 6,060,722; 6,161,760; 6,298,176; 6,491,223; D392,282; D400,199, and D400,872 (collectively the "HHP Patents").

In September 1999, HHP was acquired by Welch Allyn, Inc. ("Welch Allyn"), a direct competitor of Symbol. Later that fall, Welch Allyn announced that it intended to acquire another competitor of Symbol's, PSC, Inc., with whom Symbol was engaged in patent litigation.

On March 13, 2000, Welch Allyn's in-house counsel sent an email to Symbol's in-house patent counsel indicating that certain Welch Allyn patents might "present problems" to Symbol's Golden Eye product line. (D.I.19)

On June 6, 2000, Welch Allyn began negotiating with Symbol on behalf of Welch Allyn's newly acquired subsidiary, PSC, Inc. (*Id.*) Later that month, a meeting was held between Symbol and Welch Allyn to discuss the licensing of certain patents held by HHP relating to the Golden Eye product line. At that meeting, a list of twenty-three (23) patents was presented to Symbol which Welch Allyn viewed as relevant. (*Id.*)

\*2 On June 28, 2000, a second list was provided to Symbol by HHP in response to a request made at the earlier meeting. This second list contained only ten (10) patents, eight of which were previously listed on the first list, and two of which were new additions. The June 28 letter indicated that these patents should be the topic of further licensing discussions between the parties. (*Id.*)

On November 30, 2000, Symbol acquired Telxon, a

Texas company that was at the time engaged in patent-related disputes with Welch Allyn. Previously that year, Welch Allyn had sent a list of patents to Telxon, identical to the first list sent to Symbol, and suggested that Telxon's products might be infringing. Welch Allyn had also previously raised infringement issues with Metanetics, a Telxon subsidiary. (*Id.*)

Relations between Symbol and Welch Allyn deteriorated completely when Welch Allyn filed a lawsuit against Symbol in North Carolina regarding a certain contract that they shared to provide products to the United States Postal Service. (*Id.*)

On January 21, 2003, Symbol filed a two-count complaint alleging that HHP has infringed the Symbol Patents and seeking declaratory judgment that the HHP Patents are not infringed, invalid and/or unenforceable. (D.I.1)

In Count I of the complaint, Symbol alleges that "HHP infringed and continues to infringe, has induced and continues to induce others to infringe, and/or has committed and continues to commit acts of contributory infringement of, one or more claims of each of the Symbol Patents." (D.I. 1 at 6) In Count II of the complaint, Symbol seeks a declaratory judgment that the HHP Patents are noninfringed, invalid, and unenforceable. (*Id.*)

### III. DISCUSSION

#### A. HHP's Motion to Dismiss U.S. Patent No. 5,591,956

HHP contends that the court is without subject-matter jurisdiction as to U.S. Patent No. 5,591,956 ("956 patent"). (D.I.11) At oral arguments before the court on October 28, 2003, HHP's counsel affirmatively stated that the 956 patent is dedicated to the public; therefore, this patent will be dismissed from the complaint.

#### B. HHP's Motion to Dismiss U.S. Patent No. 5,130,520

HHP contends that U.S. Patent No. 5,130,520 ("520 patent") should be dismissed because it is the subject of a valid license from Symbol. Symbol contends that there is a license for the 520 patent, but that it pertains to a narrow field of use. It is established law that a licensee that exceeds the scope of its license may be held liable for infringement. See General Talking Pictures Co., 304 U.S. 175, 58 S.Ct. 849, 82 L.Ed. 1273 (1938); Eli Lilly & Co. v. Genentech Inc., 17 U.S.P.Q.2d 1531, 1534 (S.D.Ind.1990).

Consequently, HHP's motion to dismiss the 520 patent will be denied.

#### C. HHP's Motion to Dismiss Infringement and Noninfringement Claims from Count I and II for Failure to State a Claim, Motion to Dismiss Symbol's Claims of Invalidity and Unenforceability, and Motion for a More Definite Statement

\*3 HHP contends that Symbol's complaint is facially defective under Fed.R.Civ.P. 8(a), as it fails to provide sufficient notice of which of HHP's products infringe claims under the Symbol Patents and which of Symbol's products may infringe HHP Patents. (D.I. 11 at 16) HHP, however, has failed to cite any precedent binding upon this court that requires a complaint to identify the basis of an infringement claim with such particularity. [FN1] It is established law that liberal pleading requirements are designed to put the parties on notice generally as to the nature of the cause of action. Conley v. Gibson, 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957); Weston v. Pennsylvania, 251 F.3d 420, 429 (3d Cir.2001). Particularly in complex litigation, it is through the discovery process that the parties refine and focus their claims. At this stage in the litigation, the court declines to dismiss Symbol's claims until adequate discovery has been completed.

[FN1. The court notes that HHP attempts to bootstrap Fed.R.Civ.P. 11 requirements into Rule 8, without actually alleging that Symbol's complaint is frivolous. (D.I. 11 at 9-10) In the absence of an actual motion by HHP to the contrary, the court will assume that Symbol's counsel has complied with their ethical obligations under Fed.R.Civ.P. 11.

In the alternative, HHP moves the court to require Symbol to provide a more definite statement pursuant to Fed.R.Civ.P. 12(e). A motion under Rule 12(e) is to correct a pleading that is "so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading." The purpose, however, of Rule 12(e) is not to make it easier for the moving party to prepare its case. Fed.R.Civ.P. 12 advisory committee's note. In this case, the crux of HHP's motion is that Symbol's complaint is simply too large. There are, however, a finite number of claims and a finite number of infringing products. Consequently, the court finds that traditional mechanisms of discovery are the proper tools to refine the scope of this litigation. HHP's motions in this regard will be

denied.

#### D. HHP's Motions to Dismiss Count II for Lack of Subject Matter Jurisdiction

HHP contends that the court is without subject matter jurisdiction as to the HHP Patents, as there is not an actual controversy within the meaning of § 2201. (*Id.*) See Vectra Fitness, Inc. v. TNWK Corp., 162 F.3d 1379, 1383 (Fed.Cir.1998).

Declaratory judgment pursuant to 28 U.S.C. § 2201 requires that there be "(1) an explicit threat or other action by the patentee, which creates a reasonable apprehension on the part of the declaratory plaintiff that it will face an infringement suit, and (2) present activity which could constitute infringement or concrete steps taken with the intent to conduct such activity." BP Chemicals Ltd. v. Union Carbide Corp., 4 F.3d 975, 978 (Fed.Cir.1993). In reaching its conclusion, the court must apply a totality of the circumstances standard. See C.R. Bard, Inc. v. Schwartz, 716 F.2d 874, 880 (Fed.Cir.1983).

The recent contentious and litigious history between the parties weighs in favor of a finding that Symbol has a reasonable apprehension of suit. In EMC Corp. v. Norand Corp., 89 F.3d 807 (Fed.Cir.1996), the Federal Circuit stated that the "test for finding a 'controversy' for jurisdictional purposes is a pragmatic one and cannot turn on whether the parties use polite terms in dealing with one another or engage in more bellicose saber rattling." *Id.* at 811. The Court of Appeals continued and emphasized that "the question is whether the relationship between the parties can be considered a 'controversy,' and that inquiry does not turn on whether the parties have used particular 'magic words' in communicating with one another." *Id.* at 812. Therefore, the absence of an explicit threat of suit, while a factor, is not dispositive. See BP Chemicals Ltd. v. Union Carbide Corp., 4 F.3d 975, 979 (Fed.Cir.1993) ("Declaratory judgment jurisdiction does not require direct threats.").

\*4 Further, it is relevant under Federal Circuit precedent that at oral argument HHP did not affirmatively state that it would not bring suit. In C.R. Bard Inc., the Court of Appeals held that a plaintiff had a reasonable apprehension of suit when the defendant in a declaratory judgment declined to affirmatively state at oral arguments that he would not bring a suit for infringement against the plaintiff. [FN2] 716 F.2d at 881.

[FN2] The court is not entirely comfortable with the notion that a plaintiff might bring a declaratory judgment against a defendant for the purpose of forcing an admission of the defendant's intent to enforce its patent rights. The court is also uncomfortable with the notion that a defendant might plead that the plaintiff has no reasonable apprehension of suit, and then file in another forum once the declaratory judgment has been dismissed for want of subject matter jurisdiction. Nonetheless, the Federal Circuit in C.R. Bard made it clear that the failure to deny an intent to sue for infringement is a factor to be considered.

Having concluded that the totality of circumstances sufficiently demonstrates a reasonable apprehension of suit, nonetheless, Symbol has not established a reasonable apprehension of suit with respect to each of the named HHP Patents. At most, the affidavit and accompanying documents filed to support the complaint suggest that only those patents referenced in the June 28, 2000 correspondence from Welch Allyn are proper subjects of a declaratory judgment suit. [FN3] Consequently, the court will dismiss without prejudice those HHP Patents which were not the subject of the June 28, 2000 correspondence.

[FN3] Those patents are: U.S. Patent Nos. 5,286,960; 5,900,613; 5,723,868; 5,780,834; 5,784,102; 5,825,006; 5,831,254; 6,060,722; 5,929,418; and 5,965,863.

With respect to the remaining HHP Patents, the court finds that Symbol satisfies the "present activity" requirement of § 2201. It is sufficient that Symbol engages in the manufacture and production of products sufficiently similar to HHP's patents. See Millipore Corp. v. Univ. Patents, Inc., 682 F.Supp. 227, 232 (D.Del.1987). Moreover, the fact that HHP's own correspondence to Symbol suggests that licensing of its patents may be needed is sufficient for the court to conclude that there is "present activity" as required under § 2201.

#### E. HHP's Motion to Strike Symbol's Allegations of Unenforceability for Failure to Plead with Particularity

The court will dismiss Symbol's claims for unenforceability without prejudice. Fraud is a clear exception to the otherwise broad notice-pleading

standards under Fed.R.Civ.P. 9. A claim of patent unenforceability is premised upon inequitable conduct before the Patent & Trademark Office ("PTO"), which is a claim sounding in fraud. A plaintiff alleging unenforceability, therefore, must plead with particularity those facts which support the claim the patent holder acted fraudulently before the PTO. As Symbol has failed to adequately plead its bases for unenforceability of the remaining HHP Patents, that portion of Count II will be dismissed without prejudice.

#### IV. CONCLUSION

At Wilmington this 14th day of November, 2003, having held oral argument and reviewed HHP's motion to dismiss pursuant to Fed.R.Civ.P. 8(a), 9, 12(b)(1), 12(b)(6) and 12(f), or in the alternative for a more definite statement pursuant to Rule 12(c) (D.I.10), and Symbol's response thereto;

IT IS ORDERED that:

1. HHP's motion to dismiss Count II of Symbol's complaint with respect to U.S. Patent No. 5,591,956 is granted. (D.I.10-1)

2. HHP's motion to dismiss U.S. Patent No. 5,130,520 of Count I is denied. (D.I.10-2)

3. HHP's motion to dismiss infringement and noninfringement claims from Counts I and II of the complaint pursuant to Fed.R.Civ.P. 8 and 12(b)(6) is denied. (D.I.10-3)

\*5 4. HHP's motion to dismiss Count II of the complaint pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6) for lack of subject matter jurisdiction is granted with respect to U.S. Patent Nos. 5,291,008; 5,391,182; 5,420,409; 5,463,214; 5,569,902; 5,723,853; 5,773,806; 5,773,810; 5,786,586; 5,793,967; 5,801,918; 5,837,985; 5,838,495; 5,914,476; 5,932,862; 5,942,741; 5,949,052; 5,949,054; 6,015,088; 6,161,760; 6,298,176; 6,491,223; D392, 282; D400,199; and D400,872, and is denied with respect to U.S. Patent Nos. 5,286,960; 5,900,613; 5,723,868; 5,780,834; 5,784,102; 5,825,006; 5,831,254; 6,060,722; 5,929,418; and 5,965,863. (D.I.10-4)

5. HHP's motion pursuant to Fed.R.Civ.P. 8 and 12(b)(6) to dismiss Symbol's invalidity and unenforceability claims from Count II is denied. (D.I.10-5)

6. HHP's motion to strike Symbol's allegations of

unenforceability pursuant to Fed.R.Civ.P. 12(b)(6) or 12(f) is granted. (D.I.10-6)

7. HHP's motion for a more definite statement is denied. (D.I.10-7)

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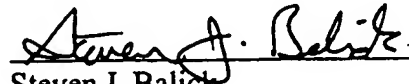
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**CERTIFICATE OF SERVICE**

I hereby certify that on the 9<sup>th</sup> day of January, 2003, the attached **REPLY BRIEF IN SUPPORT OF PLAINTIFF'S MOTION TO STRIKE PARAGRAPH 26 OF THE AFFIRMATIVE DEFENSES AND DISMISS PARAGRAPH 48 OF COUNT I AND COUNT III OF THE COUNTERCLAIMS BY NUTRINOVA INC. AND NUTRINOVA NUTRITION SPECIALTIES & FOOD INGREDIENTS GMBH** was served upon the below-named counsel of record at the address and in the manner indicated:

George Pazuniak, Esquire  
Connolly Bove Lodge & Hutz LLP  
The Nemours Building  
1007 North Orange Street  
P.O. Box 2207  
Wilmington, DE 19801

**HAND DELIVERY**

  
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Steven J. Balick